

MODEL CERCLA ABILITY TO PAY PROVISIONS FOR USE IN DE MINIMIS SETTLEMENTS WITH ABILITY TO PAY AND NON-ABILITY TO PAY PARTIES

This document provides recommended language for settling with ability to pay *de minimis* parties in accordance with Section 122(g)(7) of CERCLA, as amended, 42 U.S.C. § 9622(g)(7). It sets forth the specific changes to be made to the model Section 122(g) *de minimis* contributor consent decree (“CD”) and administrative order on consent (“AOC”) when entering into such a settlement with both ability to pay (“ATP”) and non-ATP potentially responsible parties. The changes set forth below may also be tailored for use in any *de minimis* landowner AOC or CD entered into with an ATP party in the event that such settlement calls for a cash payment. If a *de minimis* landowner settlement with an ATP party calls for the United States to be paid a percentage of the proceeds of the future sale of land, appropriate language may be found in the January 1, 2001 “Model CERCLA Ability to Pay Peripheral Party Cashout Consent Decree.”

All references in this document are to the language and numbering of the “Revised Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree” and the “Revised Model CERCLA Section 122(g)(4) *De Minimis* Contributor Administrative Order on Consent” issued on the same date as this document.

All ability to pay settlements must be based on an ability to pay analysis and require payment of an appropriate ability to pay amount, as outlined in the “General Policy on Superfund Ability to Pay Determinations” (September 30, 1997).

1. STATEMENT OF PURPOSE

Make the following changes to the Statement of Purpose (Section IV, Paragraph 3, of the CD and Section II, Paragraph 4, of the AOC). Changes are shown in redline/strikeout:

By entering into this [Consent Decree/Consent Order], the mutual objectives of the Parties are:

a. to reach a final settlement among the Parties with respect to the Site pursuant to Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), that allows [Settling Defendants/ Respondents] to make a cash payment, including a premium, [if ATP settlors are not paying a premium, delete “including a premium,” and insert “which, except for Settling ATP Defendants/ATP Respondents, includes a premium,”] to resolve their alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, for injunctive relief with regard to the Site and for response costs incurred and to be incurred at or in connection with the Site, thereby reducing litigation relating to the Site;

b. to simplify any remaining administrative and judicial enforcement activities concerning the Site by eliminating a [substantial] number of potentially responsible parties from further involvement at the Site; ~~and~~

c. to obtain settlement with [Settling Defendants/Respondents] **who are not [Settling ATP Defendants/ATP Respondents]** for their fair share of response costs, incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, and by other persons, and to provide for full and complete contribution protection for [Settling Defendants/Respondents] with regard to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5); **and**

d. to reach an expedited settlement with [Settling ATP Defendants/ATP Respondents] for their fair share of response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, and by other persons, reduced in consideration of their demonstration of an inability or a limited ability to pay response costs pursuant to Section 122(g)(7) of CERCLA, 42 U.S.C. § 9622(g)(7), and to provide for full and complete contribution protection for [Settling ATP Defendants/ATP Respondents] with regard to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5).

2. DEFINITIONS

Add the following two definitions to the Definitions Section (Section V of the CD and Section III of the AOC):

“Financial Information” shall mean those financial documents identified in Appendix ____.

“[Settling ATP Defendants/ATP Respondents]” are those [Settling Defendants/Respondents] [insert names or “identified in Appendix ____”] who have submitted Financial Information demonstrating an inability or a limited ability to pay response costs and, as such, have qualified for a reduced settlement amount and/or an alternative payment method as provided in Section [VI of CD/VII of AOC] (Payment).

[Please note that the defined term “Settling Defendants/Respondents” includes both the ATP settlors and the non-ATP settlors.]

3. BACKGROUND/STATEMENT OF FACTS AND DETERMINATIONS

If the settlement is a CD, add the following paragraph after Paragraph C in the Background Section (Section I) :

In accordance with Section 122(g)(7) of CERCLA, EPA has reviewed the Financial Information submitted by Settling ATP Defendants to determine whether they have an inability or a limited ability to pay response costs incurred and to be incurred at the Site, taking into consideration the ability of such parties to pay response costs and still maintain their basic business operations, including their overall financial condition and demonstrable constraints on their ability to raise revenues. Based upon this Financial Information, EPA has determined that Settling ATP Defendants qualify for a reduction in settlement amount and/or an alternative payment method

within the meaning of Section 122(g)(7) of CERCLA, 42 U.S.C. § 9622(g)(7), and are able to make the payment(s) specified in Section VI (Payment).

If the settlement is an AOC, add the first paragraph to the STATEMENT OF FACTS Section (Section IV), and add the second paragraph to the DETERMINATIONS Section (Section V):

[ADDITIONAL STATEMENT OF FACT/Insert after Paragraph 11] The United States has reviewed the Financial Information submitted by ATP Respondents to determine whether they have an inability or a limited ability to pay response costs incurred and to be incurred at the Site, taking into consideration the ability of such parties to pay response costs and still maintain their basic business operations, including their overall financial condition and demonstrable constraints on their ability to raise revenues.

[ADDITIONAL DETERMINATION/Insert after Subparagraph 13(h)] Based upon the Financial Information provided by ATP Respondents, the United States has determined that ATP Respondents qualify for a reduction in settlement amount and/or an alternative payment method within the meaning of Section 122(g)(7) of CERCLA, 42 U.S.C. § 9622(g)(7), and are able to make the payment(s) specified in Section VII (Payment).

4. PAYMENT

If the CD or AOC includes an installment payment plan for the ATP settlor(s), rather than merely a reduced payment amount, modify the Payment Section (Section VI of the CD and Section VII of the AOC as follows).

First, if the settlement includes both ATP and non-ATP settling parties, modify Paragraph 5 of the CD and Paragraph 15 of the AOC to exclude the ATP settlor(s) from the lump sum payment obligation by adding the following redlined language:

Within 30 days of [entry of this Consent Decree] [the effective date of this Consent Order], each [Settling Defendant/Respondent] **who is not a [Settling ATP Defendant/ATP Respondent]** shall pay to the EPA Hazardous Substance Superfund [insert either “the amount set forth below” or “the amount set forth in Appendix C to this Consent [Decree/Order”].

Second, insert a new paragraph immediately following the above language outlining the installment payment obligations for the ATP settlors. The Regional attorney should discuss all proposed installment payment plans with the Regional Financial Management Office, including the minimum payment that may be processed, the minimum length of time between payments, the maximum length of the payment schedule, and the calculation of interest. When drafting an installment payment plan, keep in mind that Interest is defined in Section V, Paragraph 4(f), of the CD, and Section III, Paragraph 5(f), of the AOC.

For a settlement with a single ATP settlor, insert:

[Settling ATP Defendant/ATP Respondent] shall pay to the EPA Hazardous Substance Superfund the principal sum of \$_____, plus an additional sum for Interest as explained below. Payment shall be made in [insert number and, if applicable, insert, *e.g.*, quarterly, yearly] installments. Each installment, except for the first, on which no interest shall be due, shall include the principal amount due plus an additional sum for accrued Interest on the declining principal balance calculated from the [date of entry of this Consent Decree] [effective date of this Consent Order]. The first payment of \$_____ shall be due within 30 days of [entry of this Consent Decree] [the effective date of this Consent Order]. Subsequent payments of \$_____ shall be due on [insert due dates for all subsequent payments or, *e.g.*, "January 1 of each year thereafter until all payments have been made."] [Settling ATP Defendant/ATP Respondent] may accelerate these payments, and Interest due on the accelerated payments shall be reduced accordingly.

For a settlement with multiple ATP settlors, insert a separate paragraph for each settlor as shown above, or if ATP settlors are too numerous (or if otherwise preferred), create a separate Appendix for the ATP payment plans and insert the reduced language that follows into the Payment provision:

[Settling ATP Defendants/ATP Respondents] shall make payments to the EPA Hazardous Substance Superfund in the amounts and by the dates set forth in Appendix _____. Each installment, except for the first, on which no interest shall be due, shall include the principal amount due plus an additional sum for accrued Interest on the declining principal balance calculated from the [date of entry of this Consent Decree] [effective date of this Consent Order]. [Settling ATP Defendants/ATP Respondents] may accelerate these payments, and Interest due on the accelerated payments shall be reduced accordingly.

5. FAILURE TO MAKE PAYMENT

Modify the Failure to Make Payment provision (Section VII, Paragraph 9, of the CD and Section VIII, Paragraph 19, of the AOC) by adding the following redlined language:

If any [Settling Defendant/Respondent] **who is not a [Settling ATP Defendant/ATP Respondent]** fails to make full payment within the time required by Paragraph [5 of the CD/15 of the AOC], that [Settling Defendant/Respondent] shall pay Interest on the unpaid balance. **If any [Settling ATP Defendant/ATP Respondent] fails to make any payment under Paragraph ____ [reference ATP installment plan paragraph] by the required due date, all remaining installment payments and all accrued Interest shall become due immediately upon such failure, and Interest shall continue to accrue on any unpaid amounts until the total amount due has been received.** In addition, if any [Settling Defendant/Respondent] fails to make full payment within the time required by Paragraph [5 of the CD/15 of the AOC], the United States may, in addition to any other available remedies or sanctions, bring an action against that [Settling

Defendant/Respondent] seeking injunctive relief to compel payment and/or seeking civil penalties under Section 122(l) of CERCLA, 42 U.S.C. 9622(l), for failure to make timely payment.

6. CERTIFICATION

Add the following additional paragraph to the end of the Certification provision (Section VIII, Paragraph 10, of the CD and Section IX, Paragraph 20, of the AOC):

Each [Settling ATP Defendant/ATP Respondent] further certifies individually that it has submitted Financial Information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the Financial Information was submitted to EPA and the time [Settling ATP Defendant/ATP Respondent] executes this [Consent Decree/Consent Order].

7. COVENANT NOT TO SUE BY UNITED STATES

Make the following changes to the Covenant Not to Sue by United States provision (Section IX, Paragraph 11, of the CD and Section X, Paragraph 21, of the AOC):

In consideration of the payments that will be made by [Settling Defendants/Respondents] under the terms of this [Consent Decree/Consent Order], and except as specifically provided in Section [X of the CD/XI of the AOC] (Reservations of Rights by United States), the United States covenants not to sue or take administrative action against any of the [Settling Defendants/Respondents] pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607[, and Section 3007 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973], relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect: **a) for each [Settling Defendant/Respondent] who is not a [Settling ATP Defendant/ATP Respondent], upon receipt of that [Settling Defendant's/Respondent's] payment as required by Section [VI of the CD/VII of the AOC] (Payment) of this [Consent Decree/Consent Order]; and b) for each [Settling ATP Defendant/ATP Respondent], upon receipt of that [Settling ATP Defendant's/ATP Respondent's] first payment as required by Section [VI of the CD/VII of the AOC] (Payment) of this [Consent Decree/Consent Order].** With respect to [Settling Defendants/Respondents] individually, this covenant not to sue is conditioned upon: **a) the satisfactory performance by each [Settling Defendant/Respondent] of all obligations under this [Consent Decree/Consent Order], including but not limited to, payment of all amounts due under Section [Section VI of CD/VII of AOC] (Payment); and b) the veracity of the information provided to EPA by [Settling Defendant/Respondent] relating to [Settling Defendant's/Respondent's] involvement with the Site. With respect to [Settling ATP Defendants/ATP Respondents] individually, this covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to EPA by each [Settling ATP Defendant/ATP Respondent]. If the Financial Information submitted by any [Settling ATP Defendant/ATP Respondent] is subsequently determined by EPA to be false or, in any material respect, inaccurate, that [Settling ATP Defendant/ATP Respondent] shall forfeit all payments made pursuant to this [Consent**

Decree/Consent Order] and this covenant not to sue and the contribution protection in Paragraph [19 of the CD/29 of the AOC] shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose the United States' right to pursue any other causes of action arising from [Settling ATP Defendant's/ATP Respondent's] false or materially inaccurate information. This covenant not to sue extends only to [Settling Defendants/ Respondents] and does not extend to any other person.

8. RESERVATIONS OF RIGHTS BY UNITED STATES

First, add the following paragraph to the end of the Reservations of Rights by United States provision (Section X of the CD and Section XI of the AOC):

Notwithstanding any other provision of this [Consent Decree/Consent Order], the United States reserves, and this [Consent Decree/Consent Order] is without prejudice to, the right to reinstitute or reopen proceedings against any individual [Settling ATP Defendant/ATP Respondent] in this action or in a new action, or to commence a new action seeking relief other than as provided in this [Consent Decree/Consent Order], if the Financial Information provided by any such [Settling ATP Defendant/ATP Respondent], or the financial certification made by any such [Settling ATP Defendant/ATP Respondent] in Section [VIII of the CD/IX of the AOC – reference whole section so that both Certification paragraphs are included] is false or, in a material respect, inaccurate.

Second, please note that the cost overrun reopener (in Paragraph 13(b) of the CD and 23(b) of the AOC) may be excluded for ATP settlors even if they are unable to pay a premium in the percentage required, or by the due date required, of the non-ATP settlors, if the inability to pay the premium is supported by the ATP analysis.

9. INTEGRATION/APPENDICES

In the Integration/Appendices provision (Section XIV, Paragraph 21, of the CD and Section XV, Paragraph 31, of the AOC), include references to all additional appendices used, which may include:

- a. the list of financial documents submitted to EPA by each [Settling ATP Defendant/ATP Respondent];
- b. the list of [Settling ATP Defendants/ATP Respondents]; and
- c. the payment schedules for the [Settling ATP Defendants/ATP Respondents].

10. DISCLAIMER

This model language and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency and U.S.

Department of Justice. They are not rules and do not create legal obligations. The extent to which EPA and DOJ uses them in a particular case will depend upon the facts of the case.